

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT – II**

C.P.(IB)-1951(MB)/2019

(Under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016)

In the matter of

Vejas Power Projects Private Limited

Having registered office at: IL&FS Financial Centre, Plot No. C-22, G Block, Bandra-Kurla Complex, Bandra-East Mumbai, Maharashtra -400051.

.....Financial Creditor

Vs

Vaayu Infrastructure LLP

Having Registered Office at: 1102(2), 11th Floor, Fortunate Terrace, New Link Road, Andheri (West), Mumbai, Maharashtra-400053.

.....Corporate Debtor

Order delivered on: 03.06.2022

Coram:

Hon'ble Member (Judicial) : Justice P.N. Deshmukh (Retd.)

Hon'ble Member (Technical) : Shri Shyam Babu Gautam

Appearances:

For the Financial Creditor : Mr. Ashish Kamat
& Mr. Pulkit Sharma, Counsels
For the Corporate Debtor : Mr. Vikram Nankani, Sr. Counsel
For the RP : Mr. Jash Shah, Counsel

ORDER**Per- Shyam Babu Gautam, Member Technical**

1. This is an application filed by Vejas Power Project Limited, Financial Creditor (Petitioner herein) under Section 7 of Insolvency and Bankruptcy Code, 2016 (I&B Code) against the Vayu Infrastructure LLP (Corporate Debtor) for initiating of Corporate Insolvency Resolution Process (CIRP) for default in repayment of total amount of Rs. 2,68,88,44,690/- (Rupees Two hundred sixty eight crore eighty eight lakh forty four thousand six hundred ninety) including interest as on 01.01.2019.
2. This Petition against the Corporate Debtor was admitted by this Tribunal vide its Order dated 30.08.2019. However, the Hon'ble NCLAT vide its order dated 11.02.2022 has set aside the admission order as the same was passed ex-parte and has remanded back the matter to this Hon'ble Tribunal for the matter to be heard afresh.
3. Learned Counsel appearing for the Petitioner argued that the facts and the transactions leading to the filing of instant application as per the Financial Creditor is as follow:-

- (a). IL & FS Financial Services Limited had provided Financial assistance to Wind World Wind Farm (MP) Private Limited. (Borrower) of Rs. 100 Crores and 110 crores vide facility agreement dated 27.06.2014 and 24.09.2014 respectively.
- (b) The Corporate Debtor herein as stood corporate guarantor to these loans and executed irrevocable and unconditional letters of guarantee dated 27.06.2014 and 24.09.2014 respectively.
- (c) The facilities provided by IL & FS were assigned to the Financial Creditor (Applicant) herein vide assignment dated 30.12.2005.
- (d) There were several defaults, and the Financial Creditor sent a demand notice dated 10.01.2018 to the borrower and the corporate debtor (guarantor) herein. Thereafter, recall notice dated 29.01.2018 for an amount of Rs. 254, 72,62,584/- was sent to the borrower as well as the Corporate Debtor. Since the borrower failed to pay the amount as demanded, the Financial Creditor herein invoked the guarantee provided by the Corporate Debtor vide notice dated 07.02.2018. The Financial Creditor had also invoked the Corporate Guarantee (s) and filed the application under Section 7 of the Code against the Corporate Debtor before this Hon'ble Tribunal. The counsel further informed that the date of default of the financial debt is 08.02.2018 and the Petition is stated to be filed within period of limitation. It is a clear case where there is debt and default and the petition is complete. A bare perusal of exhibits makes it clear that the Corporate Debtor was well aware and voluntarily signed documents at all stages and

the Corporate Debtor has also admitted its liability in its own reply to the Petition.

(e) Thus, the basic requirement for admissions of Section 7 petition has been met and therefore this Petition should be admitted, and IRP as proposed by the applicant to be appointed.

4. Counsel for the Respondent, Corporate Debtor, said that the transactions does not come within the meaning of financial transaction/financial debt and is only facilitative transactions towards advance payment for the completion of supply of Wind power projects as per MOU dated 27.07.2010 between IL & FS Energy Development Company Limited, and Wind World India Limited. The learned counsel for the respondent further explained the background of the transactions as follows:-

1.1 IL & FS Energy Development Corporation Limited (IEDCL) signed a MoU dated 27.07.2010 with Wind world India Limited (WWIL) for WWIL to set up wind energy project for a total capacity of 1004 MW for IEDCL in a phased manner.

1.2 Later 100% subsidiary of IEDCL were incorporated as SPVs (IEDCL SPVs) for the purpose of investing in Wind projects. Agreements were executed between IEDCL and WWIL and orders were placed by IEDCL SPVs for the supply, erection and commissioning of Wind power projects with Wind World (India) Limited and purchase orders for transfer of development rights were placed on wind world wind resources development private limited (WWRDPL), a 100% subsidiary of WWIL, in a phased manner spanning over five phases between 2010 and 2014.

- 1.3** Phase 1, Phase 2 and Phase 3 comprised of capacity of 325.60 Mega Watt (MW) out of the total capacity of 1004 MW. Purchased orders were placed by following IEDCL SPVs on WWIL and fully executed by WWIL.
- 1.4** Phase 4 and 5 comprised of a capacity of 678.4 MW. Out of this 678.4 MW, capacity, project totalling 449.6 MW were fully executed, 124.8 MW capacity was cancelled abruptly by the IEDCL SPVs in 2015-16 and 104 MW remains un commissioned as on date for which part material has been manufactured and supplied by WWIL.
- 1.5** Significant commercial aspects of this entire capacity totalling to 1004 MW are :-
- (a) Turnkey price of various contract placed on WWIL and WWRDPL for the supply installation, testing and commissioning of 0.80 MW wind turbine generators (WTGs) ranged between Rs. 4.36 cr to Rs. 4.39 cr per WTG.
- (b) Payment by IEDCL SPVs was to be made as per following milestone under the purchase order placed by the IEDCL SPVs on WWIL:-
- 25%-payment interest free advanced against advance bank guarantees
- 65% - payment against supply of material
- 5%- payment against commissioning of the wind turbines
- 5%- payment against hand over the entire project site.

(c) Upon achieving the milestone, WWIL raised invoices and payment claims for supply erection, testing and commissioning and world wind resource development private limited a 100% subsidiary of WWIL (WWRDPL), raised invoices for transfer of development rights on the IEDCL SPVs.

1.6 As per details in para 1.5 (b) above, WWIL was entitled to receive full payments from the IEDCL SPVs as and when the project milestones were achieved by WWIL from the IEDCL SPVs from time to time.

1.7 However, the IEDCL SPVs faced challenge in raising loans from its lenders to make the payments to WWIL under the purchase orders placed by them on WWIL. Consequently, WWIL was provided with advance by IL & FS group in the form of loans from IL & FS financial service limited (IFIN), the financial lending arms of IL & FS group and IFIN and WWIL entered into loan agreements from time to time to enable WWIL to receive funds advanced in the form of loans in lieu of projects related payments to be made to WWIL by the IEDCL SPVs as detailed in para 1.5 (b) above at market interest rates with a clear understanding that whenever WWIL completes its project obligations under various contract and becomes entitled to payment, vide a letter from WWIL to the respective IEDCL SPVs, these IEDCL SPVs will make payment directly to IFIN and IFIN will square the same against the advance payment made and shown as outstanding loans given by IFIN to WWIL. Thus, whenever the IEDCL SPVs realise they were not able to organize the project finances with their lenders in time for phase

4 and 5, the arrangement of funding project related advance and other payments in the form of loan from IFIN to WWIL was put into place. This resulted in several payment delays and on the other hand the IEDCL SPVs wanted WWIL to maintain a high rate of project commissioning irrespective of the delayed payment due to their proposed listing on Singapore Stock Exchange.

The total value of MoU was approximately Rs. 5525 cr for the 1004 MW capacity. However, advance/project milestones payments by way of loans were given to WWIL by IFIN in relatively small tranches of Rs. 50 to 100 cr. WWIL, having considerably invested into the projects, reluctantly agree with the IEDCL SPVs to take advance payment by way of loans on an understanding that at no point of time would there be default on the advance payments (loans) as there will always be enough projects progress to justify pre-payment of the advanced payment by way of loan by using the proceeds payable by the IEDCL SPVs to WWIL for squaring of the advanced amount (loans) against the supply made by WWIL to the IEDCL SPVs as detailed above:-

Loan No.	INR Crores	Borrower	Guarantor	Date of Disbursement	Tenure	Date of adjustment of the loan (advance payment)
1	100	WWIL	Vish Wind	27.11.2012	9 Yrs.	30.9.2014
2	20	WWIL	Vish Wind	14.6.2013	12	28.3.2014
3	50	WWIL	Vish Wind	26.8.2014	6	28.3.2014
4	28	WWIL	Vaayu India	21.3.2014	3	17.4.2014
5	32	WWWFCPL- Wind World Wind Farm Chitradurga Pvt Ltd- 100% subsidiary of WWIL	Vish Wind	21.3.2014	3 Months	17.4.2014
6	45	WWWFMPPL- Wind World Wind Farm MP	Vish Wind	25.3.2014	6 Months	27.9.2014

		Pvt Ltd- 100% subsidiary of WWIL				
7	50	WWWFCPL	Vish Wind/ Vaayu	28.5.2014	6 Months	30.5.2014
8	100	WWWFMPPL- Wind World Wind Farm MP Pvt Ltd- 100% subsidiary of WWIL	Vish Wind/ Vaayu India	30.6.2014 to 26.8.2014	12 Months	Remain Unpaid
9	110	WWWFMPPL- Wind World Wind Farm MP Pvt Ltd- 100% subsidiary of WWIL	Vish Wind	27.9.2014 to 30.9.2014	12 Months	Remain Unpaid

Post disbursement of the first four advanced/final payment by way of loans to WWIL, IFIN decided that it would not be any further advance payment by way of loans to WWIL but to WWILs subsidiaries who would be given advance payment by way of loan from loan number 5 onwards for WWIL to use the money for completion of IL & FS projects and the arrangement was with WWIL to square the advance payment by way of loans against supply that it would make to the IEDCL SPVs. This mechanism was insisted by IFIN because WWIL was referred to a joint lender Forum (JLF) under the RBI mechanism for stressed assets and IFIN did not want to be a part of the Joint Lender Forum (JLF). The same is substantiated by email of Ms. Kshama Lal of IFIN as enclosed.

WWIL along with its subsidiaries squared advance payment by way of loans amounting to Rs. 348 cr which were disbursed by IFIN to WWIL and its subsidiaries in lieu of project payments under the Purchase orders placed by the IEDCL SPVs on WWIL via issuance of letters of adjustment to the IEDCL SPVs, who in turn paid IFIN in line with the understandings between WWIL and IEDCL.

Thus, in total 7 nos. advance payment by way of loans amounting to Rs. 348 cr where predominantly squared off by way of adjustment between March 2014 to September 2014 by WWIL and its subsidiaries due to the increased pace of project activity. IEDCL SPVs even confirmed having received WWILs authorization of having paid this amount to IFIN as evidence by emails of Mr. Manish Vyas of IL & FS.

- 1.8** As per 1.4 above, finally in phase 4 and 5 capacity of 449.6 MW was commissioned totalling to a commissioned capacity of 775.2 MW (- 325.6 MW pertaining to phases I to III and 449.6 MW capacity pertaining to phase IV and V).

According to respondent, it had IEDCL SPVs continued with the balance project capacity of 228.40 MW to be commissioned for an invoice value of Rs. 1255.54 cr. The advance payment by way of loan of Rs. 210 cr to WWWFMPPL would also have been squared and paid by WWWFMPPL to IFIN.

Subsequently 2015-16, the IEDCL SPVs abruptly cancelled orders for a capacity of 124.8 MW invoicing value of Rs. 685 cr, despite significant project progress and asked WWIL to commissioned residual capacity of 104.4 MW for which too the material had been partially supplied by WWIL. Notwithstanding an agreement between the IEDCL SPVs and WWIL to complete the 104.4 MW projects in an agreed time frame, IEDCL SPVs further precipitated matters by unilaterally invoking bank guarantees amounting to Rs. 256 cr given by WWIL in favour of the IEDCL SPVs in Q3 and Q4 of 2016-17 without any discussion with WWIL. Importantly, had WWIL been allowed to commission the balance

capacity under 678.4 MW or an invoicing of Rs. 1255.54 cr, the advance payment by way of (residual) loan of Rs. 210 cr given by IFIN to WWWFMPPL could have been paid/squared in a similar manner as were the advance payment by way of loans amounting to Rs. 348 cr were paid off by WWIL and its subsidiaries. Consequently, the 104 MW capacity remains uncommissioned as on date which could not be completed.

For the orders of the total capacity of 130.4 MW placed by RWPPPL on WWIL, WWIL received Rs. 675.69 cr directly from RWPPPL and Rs. 34.71 cr was paid by IEDCL SPVs to IFIN to square the advance payment by way of loan given by IFIN to WWIL directly to IFIN. Similar documentation exists for all other IEDCL SPVs whereby part of the project proceeds were used to clear the loans totalling to Rs. 348 cr.

- 1.9** WWIL had executed 775.2 MW of capacity for IEDCL SPVs out of 1004 MW and while doing so paid Rs. 348 cr out of Rs.558 cr of advance payment by way of loans to IFIN. Thereafter, a capacity of 228.8 MW was to be executed between 2013 and 2015 with a project price of Rs. 1255.54 cr.
- 1.10** Since Rs. 348 cr of advance payment by way of loans were fully paid only advance payment by way of loan no. 8 for Rs. 100 cr and advance payment by way of loan no. 9 for Rs. 110 cr given to wind world wind frame MP private limited (WWWFMPPL) remain to be paid by way of execution of the projects.
- 1.11** By September 2014 since project advances and few milestone payments of only Rs. 571 cr were paid towards the 228.8 MW

projects (when advance payment by way of loan no. 8 and 9 were disbursed). A balance sum of Rs. 684 cr was collectible upon completion of project milestone. (Rs. 1255.54 cr- Rs. 571 cr)

- 1.12** Hence, there was no doubt in the mind of WWIL, WWRDPL and IFIN that the residual advance payment by way of loan of Rs. 210 cr could be paid within 12 months i.e. by 2nd and 3rd quarters of 2015 even after completing the projects.
- 1.13** At the insistence of IFIN, advance payment by way of loans 8 and 9 totalling to 210 cr to wind world wind frame MP private Limited, (so called principle borrower (WWWFMPPL) by providing additional security and corporate guarantees.
- 1.14** For various reasons attributable to IEDCL SPVs and consequent to adverse agreement policy decision, despite supply of equipment worth Rs. 300 cr by WWIL to the IEDCL SPVs out of project cost Rs. 1255 cr, IEDCL SPVs delayed to provide their approval to WWIL for the completion of the projects. Such indecision on the part of the SPVs as to were and when to install the projects, completely hampered and stalled the completion of these projects.
- 1.15** It is important to not that while IEDCL SPVs cancelled the capacity of 124.80 MW in October, 2016 and asked WWIL to adjust the project advance of 178 cr paid by it to WWIL towards the cancelled capacity of 124.80 MW as project payments for the residual capacity of 104 MW which was mutually agreed to be executed.
- 1.16** WWIL had incurred substantial expenses towards the shared infrastructure for the curtailed capacities at Jogi Halli, Karnataka

and Mahidad, Gujarat by October 2016 when the decision to curtail the capacity to 104 MW from 228.80 MW was taken by IL & FS SPVs.

- 1.17** Thus, from an order value of Rs. 1255 cr IEDCL SPVs cancelled Rs. 685 cr worth of orders from where the Rs. 210 cr was to be earned and paid back.
- 1.18** WWIL accordingly re-aligned all its resources to complete the balance project of 104 MW within the stipulated time and started supplying WTGs and its related material to the project sites. However, WWIL's surprise, the IEDCL SPVs started incashing bank guarantees of an aggregate amount of Rs. 2256 cr from 03rd October, 2016 furnished by WWIL to the IEDCL SPVs without any intimation or discussion with WWIL.
- 1.19** Meanwhile, post October, 2016 and upto February 2018 due to changes in Government policies for installation of Wind Power projects and the indecisions of IEDCL SPVs to shift either the sites or opt for alternate power sale arrangements like third party sale, even the 104 MW capacity remains uninstalled.
- 1.20** On the other hand, the grievance of the respondent is that by delaying decisions than cancelling Rs. 685 cr of orders and then even invoking Rs. 256 cr of bank guarantees IEDCL SPVs put WWIL in very precarious situations. Since the IFIN advance payment by way of bridge loans even to WWIL subsidiaries were to be paid only and only by WWIL performing its contractual obligations, WWIL was frustrated in its attempt to commission the projects and ask to pay back the advance payment by way of loan no. 8 and 9.

- 1.21** *Important to note that email dated July 08, 2015 from Mr. Akshay Sharma, from the IEDCL SPVs summarized and agreed with understanding on the method of payment of Rs. 100 cr advance payment by way of loan 8 and Rs. 110 cr loan 9 at sr. no. 4 of the email. It said that advance payment by way of loan 8 and 9 were to only repaid by WWIL performing its obligations under the Agreement and delivering goods and services.*
- 1.22** In the meantime, on 30.12.2015, an agreement was executed between IFIN and IL & FS wind project development company limited now known as Vejas Power Project Limited (IWPDCL) assigning the facilities of 100 cr and 110 cr. The said Vejas Power Project Limited extended the time to repay the amount followed by a recall notice dated 29.01.2018.
- 1.23** The arrangement of Rs. 210 cr purported to have been assigned by IFIN to Vejas Power Project Limited, (a subsidiary of IL & FS group) do not amount to assignment of Financial Debt. Vejas Power Project Limited has a business of production, collection and distribution of electricity and lending is not the primary object of the said company.
- 1.24** The learned counsel for the petitioner in support of its claim that transaction in question does not come within the meaning of financial debt relied on the chain of emails which are contemporaneous to the alleged loan agreement, the debt of which are very crucial. They are as follows:-
- a. First loan agreement was 27.06.2014- 100 cr agreement and second one was on 24.09.2014 for 110 cr. Also explained contemporaneous by way of (pg. 335-Yogesh Mehra, [director]

email to IL & FS), (pg. 338-Neerav Vaidya dated 30.11.2012), (pg. 664 volume 4- Kshama Lal dated 24.06.2014- three days before the first loan agreement) This email is pursuant to Subhash Chandra (person from IL & FS) stating lender's NoC is a must. (pg. 663 Kshama Lal dated 23.08.2014) various entities proposed to WWW group.

- b. WWIL was supposed to supply WWPG, IL & FS SPVs were not in the position to pay for the supply, ILFS did not want to pay in WWIL in absence of NoC by lenders, therefore, ILFS came up with an idea for borrowing and complete the project. Hence, wrote to WWIL to nominate and entity to whom IFIN can lend and take NoC from that other lender. These events follow an email dated 08.07.2015 [Akshay Sharma] (ILFS) was requesting for conformation. There were 9 loans and 7 were repaid back by WWIL, and instead to SPV's paying to WWIL they paid directly to IFIN and those loans were squared off. (pg. 713- reconciliation by WWIL). The emails clearly described the transactions as MWEPL is the SPV which paid to IFIN a sum of Rs. 110 cr, which was seen as on account advance in the book of SPV IFIN gave a fresh loan of Rs. 110 cr to WWIL, which sub parked this amount with MWEPL, show the advance which was shown in book of SPV got squared off by an evergreening done by ILFS as it was a circular kind of situation.
- c. The respondent argued that in the emails shown, no where there was reference to the original borrower which is WWWFMP Private Limited and ILFS clearly described this transaction between WWIL and the rest of the ILFS group. There is not a

whisper of any financial debt, any lending for time value of money which is defined under Section 5 (8) and ILFS is coming up within alternative cover up as your SPVs cannot pay and ILFS wants WWIL to not stop the production and continue to deliver the turbines to you and therefore not from the left hand take the payment from right hand of the SPV. The internal funding at pg-716 is shown to Bench which stated that total pay out to WWIL and not to WWWIFMP Private Limited, the borrower shown as 210 cr. Even, ILFS recognise by their own admission that this payment was not meant to a financial debt and it was understood that this advance payment to be adjusted against the supply. The internal document of ILFS titled WWIL projects dues- Internal Funding Memo dated 17.09.2014 clearly described and corroborated the facts stated above as to the nature of the transactions being "Book Entry Only".

- d. MoU was at pg-307 volume 2 between ILFS and WWIL which stated that phase I and II were complete and after that for III and IV when the dispute arose. (pg-717-email to Yogesh Mehra by Anand Nair)
- e. Further, in a reconciliation document of accounts between WWIL and ILFS in which these 210 cr is shown as an advance. It was stated that the amount of 210 cr given by IFIN to WWIL is paid in lieu for the price of supply of the turbines which shall be paid by the SPV and therefore in all reconciliation this amount is being reconciled in the WWIL Books and not as a debt to be recovered from WWWIFMP Private Limited and these are documents which are contemporaneous and applicant having

suppressed all this, are not entitled to any relief. There is a minimal duty cast upon every applicant under Section 7 to disclose all the documents which relate to the nature of transactions. Here, the nature of the transactions which does not support the case of the financial debt at all and the best understood is what they have recorded in their financial statement at pg-798.

- f. The balance confirmation issued by IL & FS Wind project development limited. The page 2 of the letter mentions the amount under this section 7 application as “*project advance paid by IWPDL (Letter name change to Vejas Power) to WWWFMPL and outstanding- Rs. 210 cr*”. It is pertinent to state that the said confirmation letter was jointly signed by WWWFMPL and WWIL which states that “*be confirm the following balances on behalf of the Wind World Private (India) Limited as on 31.03.2017 to whom we have assigned the above project advance as on 31.12.2016*”.
- g. Thus, both in respect of locus as well as that there is no financial debt, the application under Section 7 is not maintainable. Hence, same should be dismissed. This entire case has been based on transactions between WWIL and IL & FS in the broader sense and then they have used different corporate structure to see how the funds flow can be made so that the supply of wind turbine is not affected.
- h. He further argued that there is no rejoinder to the reply. Respondent and the Bench did not labour hard on the principle

of pleadings and in the affidavit, the respondent has taken a position that these documents which are created are vagues and the real transaction is the supply of wind turbine generators. It is because of the failure of ILFS, Vaayu was forced to take the money from IFIN and circulate within the system and the stand of the respondent remains unchallenged as it has not been denied in the rejoinder and should be considered to be true.

- i. In the balance sheet of the applicant (volume 5, pg.720) we are concerned with the non-core assets which has been described (pg. 797)- *Other Non-current assets 210 crores, which is exactly the principle amount of claimed borrowing, this must be read with the last note on pg. 798 which stated that “ the BOD on 18.07.2017 has approved the procurement and position of 56 MW’s of Wind Power assets being the under lined security against the settlement and it has been classified as capital advance and presented as Non-current asset.”*; and hence the applicant does not step in to shoes of lenders and be a financial creditor, and therefore, **there is no financial debt within the meaning of Section 5(8) and this renders him ineligible to file an application under Section 7 and thus leading to the conclusion and application is not maintainable.** It is true that Applicant have annexed a copy of assignment deed to the Section 7 application but this is precisely the case of respondent that all the documents (Assignment Document) as all this was a cover up evident from the disclosure made in their auditing financial statements made according to the accounting standard, It has to be uploaded as it is a public document. The audited financials clearly shows that the financial creditor never accounted the claim amount as a “Loan” given even in its books and always

treated it as capital advance. It is a settled law that under Section 129 of the Companies Act, 2013 the financial statements shall give true and fair view of the state of affairs of the company and shall comply with the accounting standards. Therefore, in compliance with the provision of the companies Act, 2013 and accounting standards as issued by the Institute of Chartered Accountants of India, the treatment given to the transaction by accounting the transaction as a capital advance in the financial statement was a correct picture of the affairs as the same was never a loan and any deviation or departure from their to cannot be permitted under any circumstances.

This clearly shows that the Vejas Power project Limited has knowledge that the amount due do not come within the meaning of 'financial debt', therefore, accounted the amount as a capital advance and not as "financial loan".

The arrangement of Rs. 210 cr purported to have been assign by IFIN to Vejas Power Projects Limited (a subsidiary of IL & FS group) does amount to assignment of debt. Vejas Power Projects Limited has a business of production, collection and distribution of electricity and lending is not object of the said company. Thus, it is being contended that in the instance case that there is no disbursal of any financial debt and section 7 application is liable to be dismissed.

As between the IFIN who was shown to be the assigner which is a part of IL & FS group, that cannot hold any water or cannot give them any locus to maintain this application because

the real nature of the transaction is what is recorded in their own financial statements.

1.25 Without prejudice to above, in any event the assignment agreement cannot be admissible in law for the very fact that as per Section 33 and 35 of Maharashtra Stamp Act, 1958 assignment deed cannot be taken in evidence, because the assignment is of Rs. 210 cr and Stamp Duty payable under article 5(4) (h) is 0.2% and Stamp Duty which should have been payable shall be approximately INR 44 lacs as against which they have only paid a stamp duty of Rs. 1 lakh (pg. 194), so this is an under stamped document and therefore it is inadmissible, and it cannot be a basis of Section 7. This is knocked out and it conflict with balance sheet that reflects the true nature of the transaction.

1.26 The Corporate Debtor relied on *Swiss Ribbons (P) Ltd. Vs. Union of India, (2019) 4SCC 17*, wherein the Hon'ble Supreme Court referred to the provisions of IBC enabling this Hon'ble Tribunal to discourage fraudulent and/or malicious intent of CIRP under IBC, the Petition deserves to be dismissed. The Corporate Debtor further relied upon *Anuj Jain (RP of Jaypee Infratech Ltd.) Vs. Axis Bank Ltd. 2020 SCC Online 237* wherein the Hon'ble Supreme Court has held that a person having only security over the assets of the Corporate Debtor would stand outside the sect of financial Creditor as defined in Sec. 5(7) & (8) IBC.

5. During the rejoinder submissions, learned counsel argued for the applicant that:-

- a. The entire transactions between ILFS group and WWIL and in that various corporate structures were adopted to ensure that the construction of wind turbines get completed, funds were to be disbursed and rotated through various entities, that is the case in nut shell.
- b. At the heart of it, it involves a potential project of constructions of turbines and involves requirement of funds for construction of turbine and involves at group level as to how a fund should moved from ILFS group to the WWIL group and to which entity the fund should really go to and that does not take in any manner whatsoever that the funding transaction in fact happened. It is fairly common that for the companies of this size and structure where there are multiple entity and they decide to rotate funds and give funds to specific entity pg-715 where transactions leg 1 was shown and transactions leg 2 . These are all the various emails to show possible structuring of transactions and it does not take away from the fact that the transaction actually happened.
- c. A bare perusal of the facility agreement, acknowledgement of debts and assignment agreement is to be taken in to account. The accounting treatment in the balance sheet for whatever purpose it cannot be a defence to your own acknowledgement that it is a loan and further, the assignment agreement categorically refers to the fact that a disbursement has happened and a loan was given and they acknowledged. They have acknowledged defaults and taken time to repay outstanding amount with interest, and why would they sign these documents and ask for time. Referred to 01 October,

agreement dealing with rescheduling of these repayment because there is a delay and WWIL will give additional security for it.

- d. It is merely a blame game and all defaults are indeed admitted. Further, a bare perusal of the first reply (para-RR page-28) makes it clear that this is a transactional structure, and it cannot be read into mean that loan in fact was not given or there was not amount due or there is no default.
- e. In addition to these arguments, the petitioner has relied on *State Bank of India Vs. Ramakrishnan* wherein Hon'ble Supreme Court has held that Creditor has remedy with regard to his debt against both the principal debtor as well as the surety.

Further relied on *Grasim Industries Vs. Agarwal steel* wherein Hon'ble Supreme Court has held that when a person signs a document properly and understood it and only then affixed his signature, unless there is proof of force or fraud.

6. We have heard counsel for both parties one should notice the background (reason) for disbursement by IFIN in favour of WWIL and thereafter in favour of WWWWMPPL (the so-called principle borrower).
7. IL &FS energy development corporation limited (IEDCL) signed a MoU dated 27.07.2010 with Wind World India Limited (WWIL) for WWIL to set up Wind Energy Projects for a total capacity of 1004 MW for IEDCL in a phased manner. Later 100% subsidiaries of IEDCL were incorporated as SPV (IEDCL SPVs) for the purpose of investing in Wind projects.

8. Orders were placed by the IEDCL SPV for the supply, erection and commissioning of wind power projects with wind world (India) limited and purchase orders for transfer of development rights were placed on Wind World Wind Resources Development Private Limited (WWRDPL), a 100% subsidiary of WWIL, in a phased manner spanning over five phases between 2010 and 2014.

Commercial aspects of the agreement shows the payment by IEDCL SPVs was to be made as per milestones under the purchase orders placed by the IEDCL SPVs on WWIL.

9. WWIL was entitled to receive full payment from the IEDCL SPVs as and when the project milestones were achieved.
10. However, the IEDCL SPVs faced challenges in raising long term loans to make the payment to WWIL under the purchase order placed by them on WWIL. Consequently, by way of arrangement, WWIL was asked to and provided with advance in terms of agreement but in the form of loans from IL & FS Financial Service Limited (IFIN) the Financial lending arm of IL & FS group. IFIN and WWIL entered into loan agreements termed as loan agreement from time to time to enable WWIL to receive advance payment in the form of loans in lieu of project related payments to be made to WWIL by the IEDCL SPVs. A clear understanding was that whenever WWIL complete its project/obligations under various contract become entitled to payments.

Thus, when the IEDCL SPVs realised that they are not able to organise the project finances with their lenders in time, the arrangement of funding project related advance and other payments in the form of loans from IFIN to WWIL was put into place.

11. Post disbursement of the first four advance payments by way of loans, IFIN decided that it would not give further advance payment by way of loans to WWIL but to WWILs subsidiaries who would be given advance payment by way of loans from loan no. 5 onwards although the arrangement was with WWIL to square the advance payment by way of loans against supplies that it would make to IEDCL SPVs.

WWIL along with its subsidiaries squared advance payment received by way of loans amounting to Rs. 348 cr which were disbursed by IFIN to WWIL and its subsidiaries in lieu of project payments under the purchase orders placed by the IEDCL SPVs on WWIL via issuance of letters of adjustments to the IEDCL SPVs who in turn paid IFIN in line with the understanding between WWIL and IEDCL. From the record, we found that in total 7 advance payment for completion of the project by way of loan amounting to Rs. 348 cr were pre-dominantly squared between March 2014 to September 2014 by WWIL and its subsidiary due to the increased pace of project activities. Documentations brought on record for all other IEDCL SPVs whereby part of the project proceed were used to clear the advance payment loans paid to WWIL and its subsidiaries.

12. The correspondence, emails and documents shows that the amount disbursed by IFIN to the WWIL and WWWWMPPL (subsidiary of WWIL) is by way of advance payment/payment against supply of materials commissioning of the wind turbines and on completion hand over of the wind energy project, though shown as loan. 'Vaayu Infrastructure LLP' and Vishwind Infrastructure LLP are merely the corporate guarantor.

- 13.** The essence of loan agreement is advance payment/project related payment towards supply of material, commissioning of wind turbines/completion of the wind energy project for subsidiary of IL & FS. The advance payment for such work is clear as the advance by way of loan amount were adjusted at the time of final payment for the work perform by WWIL and its subsidiaries companies WWWRDPL. The aforesaid fact clearly suggest that the advance payment has been made by IFIN by way of loan to WWIL and its subsidiary towards supply of material and for rendering services. Thus, the amount that has been disbursed by IFIN do not come within the meaning of 'Financial Debt' as defined under Section 5 (8) of the Code.
- 14.** The learned Counsel for the applicant in its rejoinders submissions concurred that the entire transactions between ILFS group and WWIL at group level and in that various corporate structures were adopted to ensure that the constructions of the wind turbines gets completed, funds were to be disbursed and rotated through various entities, that was the case in nut shell and it is fairly common that for the companies of this size and structure where there are multiple entities and they decide to rotate funds and give funds to specific entity.
- 15.** It is very clear from the document placed by the Respondent that the essence of transaction as entered between the parties herein is advance payment/final payment towards supply of materials, commissioning of wind turbines/ completion of wind energy project for subsidiaries of IEDCL. The advance/progressive payments for such work is clearly authored by ILFS group and the loan amount were adjusted at the time of final payment for the work performed by WWIL and its subsidiary company WWWRDPL. The aforesaid facts clearly

suggest that the payment has been made by IFIN to WWIL and its subsidiary towards supply of material and for rendering services. The correspondence, email and documents specially two emails namely email dated 22.01.2015 which shows that the IL & FS considered and confirmed that the payments by IFIN and IL & FS are the obligation of IL & FS and same is advanced towards the supply and by incremental supply of WEG and the second email dated 08.07.2015 shows that the amount disbursed by IFIN to WWIL and WWWMPPL (subsidiary of WWIL) is by way of advance payment/payment against supply of materials commissioning of the wind turbines and on completion of hand over of the wind energy project, though shown as loan. The Corporate Debtor herein is merely the corporate guarantor along with another Vishwind Infrastructure LLP as co-guarantor.

- 16.** The amounts assigned by IFIN to the Financial Creditor have been accounted for by Vejas Power Project Limited, as 'capital advance' in the audited balance sheet as filed by the Registrar of Companies for F.Y. 18 &F.Y. 19. This clearly shows that the Vejas Power Project Limited has knowledge that the amount due does not come within the meaning of 'financial debt', therefore, accounted the amount as a 'Capital Advance' and not as a "Financial Loan".

It is settled law that under Section 129 of the Companies Act, 2013 financial statements shall give true and fair view of the state of affairs of company and shall comply with the Accounting Standard. Therefore, no contrary stand can be taken by Vejas Power Project Limited;

17. In this case, both sides have clearly functioned as collective through their group companies in order to fulfil the terms of MoU and the transactions as stated by the Petitioner needs to be looked as a part of the transaction under the initial MoU dated 27.07.2010 entered between IL & FS Energy Development Company Limited (IEDCL) and Wind World India Limited (WWIL). Thus, the amount that has been disbursed by IFIN do not come within meaning of 'Financial Debt' as defined under Section 5(8) of the IBC as was held in the matter of *Anuj Jain IRP of Jaype Infratech Limited Vs. Axis bank Limited & Ors. 2020 SSC Online SC 237*. Though, the IFIN or Vejas Power Limited may claim to be a creditor of Wind World India Limited; towards the advance as paid by them, but such a claim is clearly not a claim in the nature of a 'Financial Debt' under Section 5(8) of IBC. In the light of above, the applicant cannot be considered as a Financial Creditor and therefore under Section 7 petition is dismissed as not maintainable, and it is filed only for recovery not for Resolution Process as per the objective of the Code.

Sd/-

SHYAM BABU GAUTAM
(MEMBER TECHNICAL)

Sd/-

JUSTICE P.N. DESHMUKH
(MEMBER JUDICIAL)

03.06.2022